Supreme Court, U.S
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

NANCY D. JONAS,

Petitioner,

v.

LESLIE D. BRIGGS, Executrix of the Estate of Jane B. Morey, Deceased,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of New Hampshire

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the courts of New Hampshire met minimum standards of due process and equal protection to ensure the protection of fundamental rights under the provisions of the United States Constitution Amendment XIV, Section 1.

II. Were Privileges and Immunities as contemplated by the United States Constitution, Article IV, Section 2, violated.

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On Petition for Writ of Certiorari to The Supreme Court of New Hampshire

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Order of the Supreme Court of New Hampshire entered in this proceeding on April 24, 1998.

PARTIES TO THE PROCEEDING

1. Cleveland, Waters and Bass, P.A.
   Michael C. Moyers, Esquire (fiduciary)
   P.O. Box 1137
   Concord, New Hampshire 03301-1137
   Tel. (603) 224-7761

   of Counsel: Douglas L. Ingersoll, Esquire
   Cleveland, Waters and Bass, P.A.

OPINIONS AND ORDERS BELOW

Opinions and Orders can be found in the Appendix together with the Table of Contents according to date of issuance.

JURISDICTION

Orders of the Supreme Court of New Hampshire were entered on September 19, 1997, February 20, 1998, and April 24, 1998. A timely Application for Reconsideration was denied by an order entered April 24, 1998.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a), 28 U.S.C.§1331, and 42 U.S.C. §§1981, 1982, 1983, and 1985

STATUTES AND RULES INVOLVED

Relevant Statutes and Rules can be found in the Appendix.

STATEMENT OF THE CASE

This case was initially brought before the Court of Probate at Concord, Merrimack County, State of New Hampshire by the Petitioner's legal counsel, Beasley and Ferber, P.A., David H. Ferber, Esquire, Vice-President of that firm whose services were retained on November 10, 1994 to enforce burial of the decedent. Additionally the firm was to challenge the alleged Will and Second Amendment to the Trust Indenture whose trustee was The Bank of New Hampshire. The Bank is a client of Cleveland, Waters & Bass, P.A., which prepared estate and probate documents including the self-proving features approved by the Court on September 13, 1994.

The decedent is Jane Bell Morey. She was 83 when she died on July 9, 1994, having never married and with no heirs. She was the only child of Dr. George W. Morey and his wife Lillian, who themselves died in the 1960's and was the first cousin of Petitioner's father. She had resided in Concord since the early 1970's, in a historic house off Capital Square on North State Street. She first became acquainted with Michael C. Moyers, Esquire, Cleveland, Waters and Bass P.A., when the offices of this firm were across from her house. She was additionally directed to her

physicians and the Bank of New Hampshire by Mr. Moyers, who was involved in the medical directives. Jane Morey chose to live in New Hampshire because of fond childhood memories of extended visits and vacations to a nearby farm on the Connecticut River, owned by Petitioner's paternal grandfather, who included the Moreys in extended family outings. Additionally, connections to New England dated to August 1653 when the ship the "Angel Gabriel" bringing relatives from England, shipwrecked at Pemequid Point, Maine. Many passengers survived, including these ancestors.

In October 1993, during a visit, Jane discussed her wish to have her ashes scattered at Pemequid Point. It was determined that while she had discussed her wishes with several people she was uncertain that these wishes would be carried out. At that time, I promised her that I would write a letter to her attorney providing contact information. Afterwards, I determined what the laws of Maine were concerning the scattering of ashes and spoke to nearby funeral directors and clergy to arrange a vesper service afterwards. Afterwards, I put the matter aside.

On June 14, 1994 at 20:39, Jane was taken to the Concord Hospital by the Concord Fire Department. There were, according to the records and observations of EMS, symptoms of an impending stroke, though they were mild. There was a 200 page or more record at the hospital where the history included, deafness, strokes and mastectomies. Despite this extensive history, she was placed on Medical Ward 5S, rather than the Cardiac Ward. It was learned through a hospital social worker, that no specialists were called. The Risk Management Department of the hospital

intervened, but information was conclusive that no consideration for transfer to nearby state-of-the-art hospitals at Dartmouth or Lebanon were considered. She became totally dehabilitated by a stroke whereupon she was transferred on July 5, 1994 to Integrated Health Services-Hackett Hill in Manchester as a Medicare patient where she was placed in their isolation room 7 and died on July, 9, 1994, attended by Dr. Johnson, presumably Robert R. Johnson, Benson and Johnson, MDs, 194 Pleasant Street of Concord. Dr. James A. Benson prepared the certificate of death and she was cremated.

There was no notice of the illness or death as had been arranged. Mr. Moyers wrote in September to say he had passed contact information to Concord Hospital and that the failure to notify me was their fault. Later discussions with the hospital revealed that social workers take that kind of information and there was no social worker assigned for Ms. Morey at any time. Mr. Moyers refused to speak when calls were placed to his office. His paralegal further reported that a specific item of personalty given to the Petitioner by Uncle George, a priceless signed Steuben sculpture was not to be located. Ms. Morey had in January made a special effort to point out its location and its meaning to her father, when Petitioner visited.

This sculpture was a gift to Uncle George upon his retirement from Steuben Glass Company. It had been especially designed and signed by Dr. Carder at Steuben Glass where he had worked for years as their chemist. His professional background included positions with Steuben, Corning Glass and also served the federal government as a member of the Manhattan Project at Los Alamos.

Ms. Morey was educated at Holton Arms, then in Washington, D.C., and by private tutors at home. She had particular interest and intellect for financial matters, especially the stock market and for genealogy. Aunt Lil was active in politics in the early 1920's, especially having to do with Women's Voting Rights. Uncle George was a prominent member of professional organizations and private clubs until his death. The estate was comprised of stocks, bonds, and priceless personalty, especially a Steuben glass collection.

The Steuben sculpture is precious, as a remembrance of the special connection to this family, because the Moreys for an extended period cared for the Petitioner, a newborn, and her mother when Petitioner's father received orders to go to Europe during World War II. They would hear of no other arrangement. Later they enjoyed entertaining at get togethers, especially during holidays. The petitioner was often invited over to paint with Aunt Lil.

The procedural events will themselves speak of the likelihood of undue influence, even harshness, breach of attorney fiduciary duty to the decedent and the heirs under third party beneficiary doctrines of Simpson v. Calivas, 6A. 2d 318 (N.H. 1994); the disregard of personal wishes and substantial burden the estate and heirs have endured at the hands of state authority and attorneys. It will justify concern for distributive aspects of the Trust Indenture. The Petitioner's legal counsel succumbed to intense interference by becoming totally ineffective and incompetent, though a capable person. Ultimately, he contrived circumstances to justify this conduct where he attempted to discredit

Petitioner and her position suing the Petitioner over a billing relative to his ineffective representation. This comprises a secondary case which went as a separate matter to the Supreme Court of New Hampshire on appeal from the District Court - Small Claims brought by David H. Ferber, attempting to collaterally stop petitioner from potentially bringing negligence and breach of contract actions.

The procedural history is inclusive of this litigation and the circumstances under which it arose. The history begins with the purported Will and the Second Amendment to the Trust Indenture, both dated March 7, 1989. The Trust was accepted for probate on September 13, 1994. The Will was controlled by the self-proving provisions to avoid probate proceedings. The Trust necessitated probate because the decedent retained certain assets in her own name. It was stipulated that the probate assets would be paid over to the Bank of New Hampshire as trustee for Ms. Morey's trust "which includes all of the dispositive provisions concerning her estate." The Bank is a long standing client of the Cleveland, Waters and Bass, P.A. law firm and was recognized by the Beasley firm as one of the "opponents" of "size and strength." Mr. Bass of Cleveland, Waters and Bass, P.A. has served as a director at the bank and the firm lists as clients, in Martindale-Hubbell, as The New Hampshire Municipal Association, Health Insurance Trust, The Property Liability Trust and the New London Hospital Trust. The firm includes former members of Congress. The Petitioner is affiliated with Republican politics through her former father-in-law Charles R. Jonas, Sr., now deceased, a distinguished member of Congress 1952-72 from the Charlotte area of North Carolina.

The distributive features of the Second Amendment to the Trust Indenture (the first dated February 26, 1981) denote the legatees, who are Leslie D. Briggs, the only sibling of Petitioner, The New England Historic Society and Bank of New Hampshire, Trustee. Petitioner is omitted as a legatee though one of the three named heirs-at-law of more distant relationship. The dispositive provisions of the document provide:

A. The Trustee shall pay the net income of Trust Estate to or for the benefit of the Grantor (Jane Bell Morey), in such amounts as Grantor may from time to time request or in such amounts as may be necessary for the Grantor's health, comfort and support.

B. The Trustee shall, at the request of the Grantor invade and pay out all or part of the principal of the Trust Estate to or for the benefit of the Grantor.

C. The Trustee (Jane Bell Morey) may at any time, in her sole discretion invade and pay out all or part of the principal of the Trust Estate to or for the benefit of the Grantor Jane Bell Morey for her health, comfort and support.

D. Upon the death of the Grantor, the Trustee (Bank of New Hampshire) shall make the following specific distributions of property free of trust: four provisions - $4,000 family ring to Petitioner, the house and land,

together with all the tangible personal property previously conveyed to the Trust by the Grantor and not specifically distributed herein or specifically bequeathed by my Last Will and Testament to Leslie D. Briggs.

In the event that any of the above named persons predecease the Grantor, then the property to be conveyed shall be disposed of in accordance with Paragraph I.E. below:

1. 1/10 to the Petitioner's father

2. 1/10 to Petitioner's mother (Both deceased by date probate begun, September 13, 1994.) (For whom there was great affection.)

3. 3/10 to the New Hampshire Historical Society in Concord, New Hampshire

4. 1/10 to Leslie Briggs, cousin

5. 2/10 to Lillian Rose Elvebach, cousin

6. 1/10 to Roger Clements, distant cousin

7. 1/10 to Mary Louise Elvebach, cousin, address unknown with location provisions

8. In the event any of the above persons predecease, the grantor shares shall be divided equally, one-half to survivors of the above named person in proportion to their

shares in the Trust and one-half to the New Hampshire Historical Society of Concord, New Hampshire.

The Bank is also appointed successor trustee. Mr. Moyers is alternate executor.

The Trustee shall also have the power to purchase U.S. Treasury Bonds that are redeemable at par in payment of the federal estate tax and to borrow funds to make such purchase and to use such bonds for that purpose after the death of the Grantor and to deliver bonds to her legal representative for such use in accordance with Paragraph VI which states: "The Trustee is authorized to accept from time to time additional cash or other property from the grantor, her Estate or from any other source, and such additions thereupon become in all respects and integral part of the Trust and subject to all provisions of this Indenture." There was no warrant of appraisal which under rules of evidence is considered "unreliable" and must overcome that presumption before the judge. Legal fees and federal estate taxes are unknown and undisclosed.

It is uncertain if the Indenture was independently witnessed. The Will of the same date bore the signature of Michael C. Moyers, denoted as Justice of the Peace, rather than notary, and that of two attesting witnesses both employed by Cleveland, Waters & Bass, P.A. and still employed in the legal community. The signature page of the Trust Indenture uses the wording "in witness thereof, the Grantor and Trustee have hereunto set their hands. Signing as both Grantor and Trustee was Jane Bell Morey "in the presence of" Michael C. Moyers. Case law of the state,

Ruel v. Hardy, 90 N.H. 240, 246, 6 A 2d. 753; Hastings v. Bridge, 86 N.H. 247, 250, 166 A. 273 provides that in these cases, two witnesses is not sufficient attestation under the statute of wills and was without testamentary effect. Proper attestation is a common law element affecting the validity of a will. New Hampshire is one of four states retaining the three witness requirements.

A technical review of the Terms of the Indenture is as follows:

As of August 1, 1994, real estate appeared on Form 98 relevant to application for letters testamentary as having a value of "none." Personal estate was valued as "$60,000," whole amount of estate not exceeding "$60,000." Estimated estate expenses show Federal Estate Taxes "unknown at this time" (September 13, 1994), legacy and succession tax "unknown at this time," Individual income tax "-0-," funeral expenses "$1,576," legal fees "(Est.) $2,000," medical expenses "unknown at this time, total estimated expenses "$3, 576+." Under the Inventory of Fiduciaries, total personal estate is valued at "$78,159.05 including stock and bond list attached", Total real estate, $_____, examined and accepted by Judge Richard A. Hampe 1-24-95. Bond filed "$33MCo" Peerless Insurance Co. Inventory list dated October 16, 1996. The house and land sold for $55,000 on May 17, 1995 to Steven Goldman, attorney, whose offices are adjacent. Mr. Goldman is a friend and colleague of David H. Ferber. Comparables from Map 46 are not known.

The disposition of the property was odd in context of Ms. Morey's conversation with the Petitioner where she

confided on several occasions that she had bequeathed her home and land to the executrix because she felt she would use and enjoy the house in the tradition which her paternal grandfather, Uncle Clarence had with his Vermont farm and New Jersey beachfront home.

The first inventory period ended January 24, 1995, having been begun September 13, 1994. The second and final accounting period was from August 1, 1995, and to April 30, 1996, and was approved October 18, 1996, by Judge Hampe. There was no notice to Petitioner although the Order decreed that the balance of $2,648.20 be delivered into the hands of the executrix and stated that "Notice thereof having been given or dispensed with according to the law, it is decreed..." The approval was discovered in the text of the Moyers Motion to Quash Discovery dated December 3, 1996.

During the period of legal representation, legal counsel took no steps to enjoin distribution, provide discovery though there was a substantial intake of fees. Only one motion was prepared during the period of representation. The Motion to Enforce Burial dated November 24, 1994, included the provision that we sought to enforce the provision of an otherwise "valid and legally enforceable will." Prior to its preparation, attorney Ferber reported a call from Mr. Moyers, which he termed threatening to his profession. Mr. Moyers submitted a Motion in Opposition on January 24, 1995 to the Motion to Enforce. Late Friday, March 10, 1995, Mr. Ferber unexpectedly withdrew, leaving the Petitioner to file the will contest pro se on Monday, March 13, 1995, which was the 6 month deadline. He provided the appropriate forms by

overnight express received March 11, 1995. The Court went without response to these two pending Motions until late May, when the Petitioner wrote to inquire about the matter. The Register of Probate responded scheduling a hearing for June 14, 1995. The Motions became joined at this time. David H. Ferber filed "limited appearance" though an associate performed the work, where an assented to continuance was arranged, to allow the Petitioner to attend. The hearing was by court order to occur before July 14, 1995. On July 13, 1995 it was called unexpectedly and the Petitioner could not attend. The Court refused to sever the Motions due to the "valid and legally enforceable" language of the Motion to Enforce. Burial by Order of the Court, July 13, 1995, was held in abeyance until the Petition to Prove was decided. The Petitioner was ordered to present a Bill of Particulars to the Court within 30 days, by August 30, 1995. On July 13, 1995, David H. Ferber submitted his "full and complete withdrawal" with respect to any and all matters pertaining to the estate, notifying the Court, Mr. Moyers and myself. On July 18, 1995, the associate attorney, Mr. Celenza faxed the Petitioner to advise that Mr. Moyers had contacted to request they notify me that the ashes would be scattered July 19, 1995. The fax was not received by the Petitioner until July 20, 1995. A subsequent billing for $500 was received subsequently after a billing for $400 for the June services. The $500 bill became the issue for the lawsuit which went ultimately to the Supreme Court of New Hampshire from the District Court Small Claims Division Judge Robert L. Cullinane.

After receiving the Court Order dated July 13, 1995, the Petitioner submitted a Motion to Extend Time, which though opposed, was granted rescheduling the August 30,

1995 hearing to October 31, 1995. The recorded session of October 31, 1995 resulted in disclosure of other wills. The court determined that matters would be taken under advisement, which included a Motion to Dismiss for Frivolous Lawsuit which was presented to Petitioner as the Judge was entering the courtroom that day. Mr. Moyers represented that he had mailed a copy, which never came. Additionally, Mr. Moyers introduced the Maryland estate into this matter by attaching a similar motion from the proceeding. Nothing further was heard from the Court until November 1996. The Petitioner submitted a Request for Production. Mr. Moyers responded with Motion to Quash on December 3, 1996, and Petitioner moved in opposition to quashing. In the Motion to Quash, reference was made to the approval of the accounting October 16, 1996, and to a purported Order of February 20, 1996, dismissing the will contest as a ground for quashing, i.e. there was not petition before the court for which discovery would be pertinent. The Petitioner was never given notice of these Orders and the Judge did not respond to a request for copy and verification. At the Petitioner's request, just before the August 13, 1977 the Registrar sent copy and alleged that the Order had been sent to former counsel who had not forwarded it. The Court had a record on file of complete withdrawal of representation dated July 13, 1995, and of Petitioner's status, pro se. Marcinak v. Lavery, 428 A.2d 587 states the Court's failure to send notice of order which is sought to be reviewed constitutes appeal nunc pro tunc; Mackinak v. Rubin, 368 A.2d 815 states "here the trial court sent notice to attorney, who court knew was dismissed by defendant prior to date of order," constitutes fraud or equivalent of breakdown in the court's operation.

It was at the hearing August 13, 1997, that acute due process violations occurred raising federal questions. The hearing was a surprise trial. At the onset, the Court proceeded to trial of the will contest, though the court session was to have included Petitioner's Request for Production, Respondent's Motion to Quash and Petitioner's Motion to Oppose Quashing. Though Petitioner moved that discovery matters be handled first, that Motion was denied and the will contest proceeded. The Petitioner had to cross examine the two witnesses, unprepared. Witnesses called by Mr. Moyers from the Bank of New Hampshire never testified because the Judge ruled on the basis of the testimony of the two witnesses to the will, that the will was proven. The Court at the request of Mr. Moyers granted immediate distribution of remaining assets including the Steuben sculpture to another. The Petitioner found evidence shortly after the trial ended which impeached the testimony of one of the witnesses. Petitioner immediately brought the matter before the Judge, who orally denied the request that the trial be resumed. The written, nearly instantaneous, Motion for Rehearing was orally denied. Written denial was dated, August 22, 1997. Another Motion submitted, also on August 13, 1997, denied Petitioner's request to set aside and that the Order for Distribution be rescinded, based upon due process concerns. It was denied September 2, 1997, even though it included report of an incident in the courtroom to the Judge. The Petitioner told the Judge that Mr. Moyers accosted her menacingly as she was gathering her papers at the counsel table, to threaten a bond so high Petitioner would be unable to meet some if she pursued appeal. No action was taken and Mr. Moyers subsequently submitted an affidavit denying the incident, though it was witnessed by Bank of New Hampshire employees in attendance, and

possibly the recorder. Federal questions were later raised before the New Hampshire Supreme Court in the Notice of Appeal.

Thus the federal questions were timely and properly raised at the Probate Court level and at the Appellate Court level and this Court has jurisdiction to review the Order of April 24, 1998, on Writ of Certiorari.

This case presents circumstances similar to the probate of the family estate in Montgomery County, Maryland (1993) Court of Probate, Rockville, Maryland, Estate No. 1993 02079RE and other cases.

ARGUMENT

1. Whether the Courts of New Hampshire met minimum standards of due process and equal protection to ensure the protection of fundamental rights under the due process and equal protection provisions of the United States Constitution Amendment XIV, Section 1.

   The Fourteenth Amendment provides . . . "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person with in its jurisdiction the equal protection of the laws."

   A determination of this question should be governed by strict scrutiny because of the nature of the action and the authority of the parties and the dependency on state laws to entitlements. Using this standard of review, there

should be an analysis whether New Hampshire offered meaningful access to its courts, fair hearings, proper notice and impartial decision making and whether any of its courts and officers of the court were party to the undue influence and coercion, directly or indirectly, which deprived the Petitioner of legal counsel. Essential to consideration of these questions is whether the courts were guided by principals of justice, fairness and equality under established rules of law or whether the courts have so far departed from the expected and usual course of proceedings, or sanctioned such departure by the lower court as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10.

The procedural history of the case presents good reasons for the Court to protect the private rights which have been violated, but fundamental reason under the Constitution is found when state actions threaten the integrity of the courts and the general welfare by subverting the system of government. Alexander Hamilton in The Federalist, No. 78 discusses the function and jurisdiction where there is an analysis by Charles A. Beard in The Enduring Federalist. Alexander Hamilton writes,

> "The judiciary is regarded as the citadel of the public justice and the public security whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Considerate men, of every description ought to prize whatever will tend to beget or fortify that temper in the courts, as no man can be sure that he may not be tomorrow the victim of a spirit of

> injustice, by which he may be a gainer today. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundation of public and private confidence, and to introduce in its stead universal distrust and distress."

Relevant to that text is Article III of the United States Constitution and Article VI, Sections 2,3.

The power of construing the law is to be in accord with the spirit of the Constitution. The Judiciary Act of 1789, §25 and decisions of the Court in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat 304 18160) and Cohens v. Virginia, 19 U.S. (6 Wheat 264 1821) articulates the Court's authority to review state court judgments. Justice Joseph Story discusses the importance of Supreme Court review ... "state interest might sometimes obstruct or control, the regular administration of justice." Chief Justice John Marshall likewise reaffirmed the constitutionality of Section 25 of the Judiciary Act and the authority of the Supreme Court to review state court judgments and said, the Court recognized that 'state courts often could not be trusted to adequately protect federal rights because in many states the judges are dependent for office and salary on the will of the legislature" and in this case both the legislature and the executive and its council. Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) notes that New Hampshire, unlike many other states, such as Michigan, permits non-lawyers to serve on its Supreme Court, New Hampshire Revised Statutes Annotated (RSA) 480: 1 et seq. (1983 and Supp. 1983, or its

intermediate Appellate Court, N.H. R.A.S. 491:1 et seq. (1983 and Supp. 1983), and that in fact 12 of the 89 justices in history were non-lawyers.

The 1958 case, Cooper v. Aaron, 358 U.S. 1 (1958) established the court's authority is not limited to review state court decisions; federal courts also have the authority to review the constitutionality of state laws and the actions of state officials.

Marbury v. Madison, 5 U.S. (1 Cranch), 137 (1803) declared the principal that the "federal judiciary is supreme in the exposition of the law of the Constitution."

Should New Hampshire assert that control of its courts vests in its Supreme Court, and the federal courts should defer to the state courts right of regulation, it would be asserting the same position as in Supreme Court of New Hampshire v. Piper 470 U.S. 274 (1985) regarding its bar. The United States Supreme Court has made clear that its deference extends only so long as the action of the state does not impinge upon federal constitutional rights, In re: Primus, 436 U.S. 412, 430 (1978). In Brotherhood Railroad Trainmen v. Virginia, 377 U.S. 1, 6 (1964) Justice Black wrote for the court that a state cannot ignore the rights of individuals secured by the constitution.

What process due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function as well as the private interest that has been affected by the

government action and the legitimacy of the action, Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

Here the precise nature of the private interest pertains to rights and privileges of testators, and heirs (intended beneficiaries) in contract and probate law and their in relationship with attorneys who prepare a will, Simpson v. Calivas, 650 A.2d 318 (N.H. 1994).

Defenses of collateral estoppel advanced in that case related to issues of negligence and breach of contract have application here. Principles of fiduciary duty and diligence reflects a respect for life. There is a private and public interest that burial be properly afforded and an inherent right to inherit, to institute and maintain actions to protect the integrity of the estate from fraud and dereliction of duty by attorneys and state officials. "In the deprivation of rights, none is so insidious as the use of official power to affect the deprivation."

Some rights are more precious than property rights, May v. Anderson, 345 U.S. 528, 533 (1953) and are somewhat difficult to articulate. Important are considerations for personal dignity, preservation of family records, rights to intellectual property for gift and to fund memorial at the University of Minnesota Graduate School of Chemistry, Dr. Morey's alma mater; family interaction over time: grandfather's generosity to Morey in the 1920s, Morey's extended care of Petitioner, a newborn and her mother, when father received orders to depart for Europe during World War II; gift of sculpture to Petitioner in 1960 from uncle;

Petitioner's pledge to fulfill burial wishes in 1990s, which was the only request ever made by the decedent.

The legitimacy of the state action can not be justified by any countervailing interest theory. There is no justifiable reason for exemption from full force due process scrutiny. In Stanley v. Illinois, 405 U.S. 645, 656 (1972) and Bell v. Burson, 402 U.S. 535 (1971), the Court stated in the latter case that due process is not intended to promote efficiency or to accommodate all possible interests. Matthews v. Eldridge, 424 U.S. 319 (1976) is also relevant in formulating consideration for application of due process.

Here was a pretense of fairness. The deception is more apparent upon a reading of the Piper case and Court rules, Rule 33(1)(2) of the Supreme Court and Rule 19, 20 of the Superior Court. These rules proscribe the practice of law in New Hampshire to out of state attorneys unless affiliated with a member of the New Hampshire bar. These rules make the unprecedented access afforded to Petitioner, an out of state, non-lawyer, subject to question. There is a *prima facie* presumption of bad faith and intent to deprive, arguably tortuously disregard substantial rights and fundamental laws of the Constitution which they are sworn to uphold. This supposition can be supported by the minimal level of review that was required in Mercer v. Merchant's National Bank, 230 A.2d 745 (N.H. 1967).

State v. Cooper, 498 A.2d 1209 (N.H. 1985) discussed discretionary review standards employed for declination of acceptance orders which is relevant to the February

20, 1998 Order of The Supreme Court of New Hampshire; also Ross v. Moffitt, 417 U.S. 600 (1974).

Under federal due process, question of whether appeal provided in state system is one of right or of discretion is a federal question, but determination according to Courts - 97 (1) and N.H. Sup. Ct. Rules 3, 7, and Michigan v. Long, 463 U.S. 1032. "It rests upon applicable state authorities conferring the appellate remedy. In light of the fact that state courts are required to apply federal constitutional standards and they necessarily create a considerable body of "federal law" in the process. "It is not surprising that this Court has become more interested in the application and development of federal law by states courts in the light of the recent expansion of federally created standards that we have imposed on the states." This provides further reason for review.

Boody v. Watson, 64 N.H. 162, 9 A. 794 (1887) states "it is written that the bounds of the Supreme Court's general superintendence of lower courts are to be determined by reason of natural justice and practical necessity on which it rests in the common law of the state." New Hampshire Revised Statutes Annotated (RSA) 490:4 provides statutory reference. Welch v. Adams, 63 N.H. 344, 1 A.1 states that "the valid execution of a will in this state is not overburdened by common law technicalities." Here two witnesses attested the valid execution of the will, where New Hampshire is one of four states, to retain the 3 witness requirement "to prevent fraud," In re Wilson Estate, 119 N.H. 425, 402 A.2d 197 (1979); also Kittridge v. Hodgman, 67

N.H. 254, 32 A. 158 (1892). Also, witnesses here did not initial each page with the testatrix and the attorney.

Further, the New Hampshire system creates vulnerability and raises separation of powers issues. Charles A. Beard in The Enduring Federalist states that New Hampshire, whose constitution was last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of the several departments. The judiciary is appointed by the executive upon approval of its executive council for a limited tenure and is intermixed with the legislature who controls its salary and has a part in its rule making authority. In probate matters, appeal is to the Supreme Court of New Hampshire with no intermediate process, and like family law, probate law is largely governed by state law. Seeking a remedy by appeal precludes a Writ of Certiorari, Logue v. Clark, 62 N.H. 184 (1882). It also foreclosures the application for the court's original jurisdiction invoking defective appeal consideration under Supreme Court Rule 11.

2. Were Privileges and Immunities as contemplated under the United States Constitution, Article IV, Section 2, violated in this case.

Article IV, Section 2 provides, "The citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states."

The level of scrutiny to be applied to an Article IV, Section 2 violation is the substantial standard. The Supreme Court of New Hampshire attempted to apply the lower reasonable basis standard in Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) which was implicitly rejected by the Court's ruling in the case. Rather, the case established that state action under the Privileges and Immunities Clause is subject to a substantiality test. When held to this standard, state action should not be allowed "to render federal constitutional guarantees irrelevant which were essential as a basis for The Union."

Corfield v. Coryell, 6 F.Cas. 546 (C.C.E.D., Pa. 1823) is felt to provide the classic statement of an original meaning of this clause. Justice Bushrod Washington wrote that it was "designed to protect the fragile rights of a vulnerable citizenry from overbearing authority and arbitrary actions of government and of one state against the citizens of another." The 1978 case, Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 387 noted that "Those privileges on Justice Washington's list would still be protected by the clause." In Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868), it was felt the clause was intended to create a national economic right. In that case, the Court said that the object of the clause was to relieve citizens from the disabilities of alienage in other states. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872) were of this period. The Federalist, No. 80 written by Alexander Hamilton, and Commentaries on the

Constitution of the United States, written by Justice Story in 1833 provide additional comments of original thought.

The more recent case of Cole v. Cunningham, 133 U.S. 107, 113, 114, 10 Sup.Ct. 271 cites these sources quoting Justice Story who said "the object of the guarantee was to confer on the citizens of the states a general citizenship and this includes the right to institute actions" and maintain actions. With regard to citizenship and probate law, the executrix is considered a citizen of New Hampshire as an extension of the testatrix, though a resident of Washington, D.C.

The recent thinking of the Court can be found in Supreme Court of New Hampshire v. Piper, 474 U.S. 270 (1985) which includes citation to other recent cases. Justice Powell wrote of Article IV, Section 2 of The Constitution that "this clause was intended to fuse into one nation a collection of independent, sovereign states", Toomer v. Witzell, 334 U.S. 385, 395 (1948)." Recognizing this purpose, we have held that it is only with respect of those privileges and immunities bearing on the vitality of the nation as a single entity that a state must accord residents and non-residents equal treatment."

Justice Powell continues "Derived, like the commerce clause from the Fourth of The Articles of Confederation" (drafted by Charles Pinckney of South Carolina) 3 M. Ferrand, Records of the

Federal Convention of 1787, p. 112 (1911). The Privileges and Immunities Clause was to create a national economic union." The courts have an indispensable role with regard to recourse to the law. "To institute and maintain actions" is one of the original recognized "privileges" and plays an undeniable role in the economic business of the Union.

Non-commercial aspects and duties are examined in Leis v. Flynt, 439 U.S. 438, 450 (1979) as bearing on the vitality and well being of the system of government. These cases look at the role attorneys play through their "adversary representation" and their role and importance to the well being of The Union. Lawyers do represent persons who raise uncomfortable challenges. "The lawyer who champions unpopular causes surely is as important to the "maintenance of well-being of The Union," Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 388 (1978). New Hampshire asserts that a lawyer's activities are bound up with the exercise of judicial power and the administration of justice. It contends that a lawyer is an officer of the court who exercises state power on a daily basis. The Piper opinion says that while "a lawyer is an officer of the court he does not hold a position entrusted only to a full-fledged member of the political community." Lawyers are sworn along with officials to uphold The Constitution. New Hampshire Constitution, Part I, Articles 12, 14, 15 discuss the equal protection provisions of the state.

The Privileges and Immunities Clause is not absolute with regard to the actions of the state judiciary. It does preclude discrimination against non-residents if 1) There is a substantial reason for the difference in treatment, 2) The discrimination against non-residents bears a substantial relation to the states' objective. In deciding whether the discrimination bears a close or substantial relation to the states' objectives, this Court considers whether the state chose the less restrictive means. New Hampshire has not yet offered its justification.

Footnote 14 of the Piper opinion references In re Griffiths, 413 U.S. 717 (1973) and Graham v. Richardson, 403 U.S. 365 (1971) for a discussion of differences between levels of scrutiny under the Equal Protection Clause and the Privileges and Immunities Clause which may be relevant. Discrimination in the Griffiths case was such as to be "subject to an enhanced level of scrutiny."

New Hampshire Superior Court Rules, R19, R20 and Rules of the New Hampshire Supreme Court, Rule 33(1) and (2) found in the Appendix are also applicable. New Hampshire Revised Statute Annotated (RSA) 311:1. - Amended January 1, 1983; September, 1987 is cited in connection with Rule 33(2) and the language of Cote v. Cote, 123 N.H. 376, 461 A.2d 566 (1983) are both relevant references.

FINAL STATEMENT

In Union Pacific R.Co. v. Public Service Comm'n of Mo., 248 U.S. 67 (1918), it was written that the "primary role of this court is to make sure that persons who seek to vindicate federal rights have been fairly heard. Justice Holmes made it clear that the court engaged in such inquiry so that it would not "be possible for a state to impose an unconstitutional burden" on a private party. In Creswill v. Knights of Pythias, 225 U.S. 246, 261 (1912), the Court explained its duty to review the findings of facts of a state court "where a federal right has been denied."

CONCLUSION

Based upon the foregoing reasons, the Petitioner respectfully requests that her Petition for Writ of Certiorari be granted.

Respectfully submitted,

Nancy D. Jonas

Dated: September 24, 1998
Beaufort, SC

Nancy D. Jonas
Petitioner, pro se

No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

NANCY D. JONAS,

Petitioner,

v.

LESLIE D. BRIGGS, Executrix, of the Estate of Jane B. Morey, Deceased,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of New Hampshire

APPENDIX

SW

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Appendix A - Order of the Court of Probate, Dated September 13, 1994

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY PROBATE COURT

IN RE: JANE B. MOREY

DOCKET NUMBER 1994-0656

SELF PROVING WILL

The foregoing instrument, purporting to be the Last Will and Testament of JANE B. MOREY late of Concord in said County, deceased, having been presented for probate;

It appears to me, the Judge of Probate for said County, that the said instrument has been executed as a Self-Proved Will in accordance with RSA 551:2-a and or RSA 552:6-a.

It is therefore decreed that said instrument be, and is hereby approved and allowed as the Last Will and Testament of said JANE B. MOREY.

Dated: 9-13-94

"s/Richard A. Hampe"
Judge of Probate

Appendix B - Order of the Court of Probate, Dated September 13, 1994

MERRIMACK,ss. COURT OF PROBATE

At a Court of Probate holden at Concord in said County, on the thirteenth day of September A.D. 1994, upon due consideration of the foregoing petition, it is decreed that the prayer thereof be granted, and that letters testamentary issue to the said petitioner accordingly.

Dated: 9-13-94

"/ Richard A. Hampe"
Judge of Probate

Appendix C - Order of the Court of Probate, Dated July 13, 1995

MERRIMACK,SS. COURT OF PROBATE

IN RE: ESTATE OF JANE BELL MOREY

DOCKET #1994-0656

ORDER

At a conference with counsel the Court entered the following order:

1. Nancy Dame Jonas shall file a bill of particular with respect to her petition to reexamine the will and prove it in solemn form. Said bill of particular shall set forth any claims she is making as to why the will should be declared void. Said bill of particular shall be filed within thirty days of Ms. Jonas shall be defaulted and the petition dismissed.

2. A further pretrial hearing on Ms. Jonas petition shall be held August 30, 1995 at 9:30 am.

3. The petition to enforce the provisions of the will shall be held in obeyance until the petition to prove the will in solemn form is decided.

Dated at Concord in said County, this thirteenth day of July A.D. 1995.

"/ Richard A. Hampe"
Judge of Probate

Appendix D - Order of the Court of Probate, Dated August 10, 1995

MERRIMACK,SS. COURT OF PROBATE

At a Court of Probate held at Concord in said County, on the 10th day of August, A.D. 1995, upon due consideration of foregoing petition, it is decreed that the prayer thereof be granted, and that the petitioner is granted 60 additional days to file her bill of particulars - no further extensions shall be granted. The pretrial scheduled for August 30, 1995 is continued to October 31, 1995 at 9:30 A.M.

"/ Richard A. Hampe"
Judge of Probate

Appendix E - Oral Order, Transcribed, of the Court of Probate, Dated October 31, 1995

Appendix F - Order of the Court of Probate, Dated August 10, 1995 [Pages 6a - 7a]

THE STATE OF NEW HAMPSHIRE

MERRIMACK,SS. COURT OF PROBATE

IN RE: ESTATE OF JANE BELL MOREY

DOCKET #1994-0656

ORDER

This is a petition to prove the will in solemn form. On July 13, 1995, the Court ordered the petitioner, Nancy Dame Jonas, to file a bill of particulars within 30 days setting forth any claims she is making as to why the will proven in common form should be declared void. On August 10, 1995 upon the petitioner's request, the Court granted the petitioner an additional 60 days to file the bill of particulars. On October 16, 1995 the petitioner filed what she entitled "Bill of Particulars". The Court has reviewed that document and finds that it does not satisfy the court's Order of July 13, 1995 and August 10, 1995 in that it does not set forth the claims upon which the petitioner intends to show why the will proven in common form should be declared void. The document merely rambles on about the decedent and apparently alleges that some of the bequests of the will are at variance with oral statements the decedent made to the petitioner.

On October 31, 1995 there was a hearing in which the petitioner made many allegations about what the decedent

had told her she intended to put in her will but was unable to make any good faith offer of proof as to any undue influence, fraud, or duress. When asked by the Court if she was alleging that the signature on the will was not the decedent's, the petitioner refused to say instead of insisting she would obtain a handwriting expert.

The court finds that neither the "Bill of Particulars" filed by the petitioner nor the statements made at the hearing on October 31, 1995 provide any factual allegations which would form the basis for finding that the will which has been accepted for probate is invalid. Furthermore, if the petitioner intended to obtain any experts in order to make a claim she should have done so long before October 31, 1995.

Considering all the evidence and arguments in this case, the Court hereby dismisses the petition to prove the will in solemn form. The will accepted into probate and proven in common form is declared valid.

Order entered this 20th day of February, 1996.

"/ Richard A. Hampe"
Judge of Probate

Appendix G - Order of the Court of Probate, Dated October 18, 1996

THE STATE OF NEW HAMPSHIRE

MERRIMACK,SS. PROBATE COURT

THE ESTATE OF JANE BELL MOREY
LATE OF Concord, NH
DOCKET NO. 1994-0656

EXECUTOR'S/ADMINISTRATOR'S ACCOUNTING

1. The second account for the period beginning August 1, 1995 and ending April 30, 1996. Check if final account x....

ORDER

At a Court of Probate held at Concord, New Hampshire, the above accounting having been file and examined, notice thereof having been given or dispensed with according to law, it is decreed that the same be allowed and there is a balance of $2,648.20 in the hands of the fiduciary.

October 18, 1996
Date

"/ Richard A. Hampe"
Judge of Probate

Appendix H - Order of the Court of Probate, Dated August 13, 1997 [Pages 9a - 10a]

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. COURT OF PROBATE

IN RE: Jane Bell Morey
Docket #1994-0656
ORDER

A hearing on various matters was held on August 13, 1997 at which the executrix, Leslie Briggs, was represented by Cleveland, Waters and Bass, PA through Michael C. Moyers, Esquire and Nancy D. Jonas appeared pro se.

The executrix proved the will in solemn form through the testimony of the two subscribing witnesses. The Court accepts the testimony of the witnesses and finds the will proven and same is hereby allowed.

The proof of the will in solemn form was done at the request of executrix. It was not done on the basis of any claims by Ms. Jonas which were disposed of in the Court's order of February 20, 1996.

The Court reaffirms its order of February 20, 1996 dismissing Ms. Jonas' claims and declaring the will valid. The Court acknowledges that Ms. Jonas did not receive a copy of the February 20, 1996 order until it was sent to her July 10, 1997 by the Register. In light of that, the Court, to the extent it has authority to do so, hereby grants Ms. Jonas 30 days from the date on the notice of the Register mailing

out a copy of this order to Ms. Jonas to appear the February 20, 1996 order.

The court hereby grants the Motion to Quash Discovery on the basis that since the Court dismissed Ms. Jonas' claims, there is no pending matter before the Court to which the discovery would be pertinent.

Dated the thirteenth day of August, A.D. 1997

"/ Richard A. Hampe"
Judge of Probate

Appendix I - Order of the Court of Probate, Dated August 22, 1997

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. COURT OF PROBATE

At a Court of Probate held at Concord in said County on the twenty second day of August A.D. 1997, upon due consideration of foregoing petition, it is decreed that the prayer thereof be denied.

The Court considers this a motion for reconsideration and it is denied.

"/s/ Richard A. Hampe"
Judge of Probate

Appendix J - Order of the Court of Probate, Dated September 2, 1997 [Pages 12a - 13a]

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. COURT OF PROBATE

At a Court of Probate held at Concord in said County on the second day of September A.D. 1997, upon due consideration of foregoing petition, it is decreed that the prayer thereof be denied and that

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(Cover Letter)

THE STATE OF NEW HAMPSHIRE

MERRIMACK PROBATE COURT

RE: ESTATE OF JANE BELL MOREY

DOCKET #1994-0656

Enclosed please find a copy of Nancy Jonas' Motion to Set Aside and Permission for Distribution of Trust assets he rescinded. That discovery proceed with schedules as the court may see fit. Please note that the Judge has denied this Motion.

September 5, 1997

/s/Patricia Fraser
Register of Probate

cc: Leslie Briggs
Jane Bell Trust Indenture Morey
Peerless Insurance Co.
Nancy Dame Jonas
Nancy Jonas

Appendix K – Appellate Order of the Supreme Court of New Hampshire, Dated September 19, 1997 [Pages 14a – 15a]

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 97-658, In re Estate of Jane Bell Morey, the court upon September 19, 1997, made the following order:

Rule 7(1) of the Supreme Court Rules requires that a notice of appeal in a civil case be filed in this court within thirty (30) days from the date of the clerk's written notice of the decision on the merits. The notice of appeal indicates that the date of the clerk's notice in this case is August 13, 1997. The petitioner's notice of appeal was filed on September 16, 1997, and thus may be late.

On or before October 4, 1997, the petitioner shall, and any other party may, file an original and seven copies of a brief memorandum addressing whether this notice of appeal should be dismissed as untimely filed. Screening of the appeal shall be held in abeyance pending responses.

Distribution:

Ms. Nancy D. Jonas
Michael C. Moyers, Esquire
Merrimack County Probate Court 94-0656
Honorable Richard A. Hampe
File

"s/Howard J. Zibel,"
Clerk

Appendix L - Order of the Supreme Court of New Hampshire, Dated February 20, 1998

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 97-658, In re Estate of Jane Bell Morey, the court upon February 20, 1998, made the following order:

Notice of appeal is declined. See Rule 7(1).

Distribution:

Ms. Nancy D. Jonas
Michael C. Moyers, Esquire
Register, Merrimack County Probate Court 1994-0656
Honorable Richard A. Hampe
Donna K. Nadeau, Supreme Court
File

"/Howard J. Zibel,"
Clerk

Appendix M - Order of the Supreme Court of New Hampshire, Dated April 24, 1998

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 97-658, In re Estate of Jane Bell Morey, the court upon April 24, 1998, made the following order:

Petitioner's motion for reconsideration is denied.

Distribution:

Ms. Nancy D. Jonas
Michael C. Moyers, Esquire
Register, Merrimack County Probate Court 1994-0656
Honorable Richard A. Hampe
Donna K. Nadeau, Supreme Court
File

"/Howard J. Zibel,"
Clerk

Other Relevant Orders

Appendix N - Order of the Concord District Court, Dated June 17, 1996

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **CONCORD DISTRICT COURT**
Docket No. 96-SC-00402

Beasley & Ferber, PA VS Nancy Dame Jonas

ORDER

The evidence is uncontradicted that the plaintiff's services were retained on a time basis. There is no dispute that the time was spent in accordance with the retainer letter. The defendant was clearly not satisfied with the quality of the services or with the result. However, the court finds that the plaintiff has met the burden of proof.

The defendant's counter-claim is denied.

June 17, 1996
Date

/s/ Robert L. Cullinane
Justice

cc: Beasley & Ferber, PA
Nancy Dame Jonas

Appendix P – Notice of Decision of the Concord District Court, Dated June 20, 1996 [Pages 19a – 20a]

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **CONCORD DISTRICT COURT**
Docket No. 96-SC-00402

Beasley & Ferber, PA
55 Hall St., P.O. Box 2463
Concord, NH 03302-2463ne

v. Nancy Dame Jonas

NOTICE OF DECISION

The Court rendered the following decision on June 17, 1996:

JUDGMENT FOR PLAINTIFF - see attached order

Plaintiff: If payment is not received within 30 days, you may complete the attached Motion for Payments form and return it to the Court with $5.00 for further action.

Defendant: You are obligated to pay the specified amount within 30 days, you may initiate collection proceedings against you, which may result inn the issuance of an order requiring your personal appearance in court.

JUDGMENT: $519.40
COSTS: $25.00
INTEREST: $6.82
TOTAL: $551.22

JUDGMENT FOR DEFENDANT

CASE DISMISSED ON PLAINTIFFS VOLUNTARY DECISION NOT TO PURSUE THE CASE.

June 20, 1996
Dated

"/Sharon Shurtleff, Acting Clerk"
Justice

cc: Nancy Dame Jonas
Tennis Villa 202
Tarpon Boulevard
Fripp Island, SC 29920

Appendix Q – Order of the Concord District Court, Dated July 3, 1996

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. CONCORD DISTRICT COURT

BEASLEY & FERBER, PA
V.
NANCY DAME JONAS
96-SC-402

ORDER

In conclusion of the defendant's Motion for Reconsideration in the above matter, the court made the following order:

The Motion for Reconsideration is denied.

July 3, 1996

"/Robert L. Cullinane.
Justice

cc: David H. Ferber, Esq.
Nancy Dame Jonas

Appendix R - Order of the Concord District Court, Dated August 28, 1996

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. CONCORD DISTRICT COURT

Docket No. 96-SC-00402

BEASLEY & FERBER, PA VS NANCY DAME JONAS

ORDER

Defendant's Motion for Appeal to Supreme Court is **granted and plaintiff's objectin overruled.**

The defendant shall file her appeal in accordance with rules of the Supreme Court.

8/28/96
Date

/s/ M. L. Sullivan
Justice

cc: David H. Ferber, Esquire
Nancy Dame Jonas

Appendix S - Order of the Supreme Court of New Hampshire, Dated October 28, 1996 [Pages 23a - 24a]

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 96-668, Beasley & Ferber, P.A. v. Nancy Dame Jonas, the court upon October 28, 1996, made the following order:

Rule 7(1) of the Supreme Court Rules requires that a notice of appeal in a civil case be filed in this court within thirty (30) days from the date of the clerk's written notice of the decision on the merits. The order denying the defendant's motion to reconsider is dated July 3, 1996. The notice of appeal contains an order of the district court which appears to be dated August 28, 1996, that grants defendant's motion for appeal to the supreme court, but which states: "The defendant shall file her appeal in accordance with rules of the Supreme Court." The defendant's notice of appeal was filed on October 15, 1996. Even assuming that the thirty-day period for filing a notice of appeal began to run on or about August 28, it would appear that the notice of appeal was untimely filed. See Rule 7(1).

On or before November 12, 1996, the defendant shall, and the plaintiff may, file an original and seven copies of a brief memorandum addressing whether this notice of appeal should be dismissed as untimely filed. Screening of the appeal shall be held in abeyance pending responses.
Distribution:

Concord District Court 96-SC-402
Honorable Robert L. Cullinane
Ms. Nancy Dame Jonas
David H. Ferber, Esquire
Michael C. Moyers, Esquire
File

",/Howard J. Zibel,"
Clerk

Appendix T - Order of the Supreme Court of New Hampshire, Dated January 6, 1997

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 96-668, Beasley & Ferber, P.A. v. Nancy Dame Jonas, the court upon January 6, 1997, made the following order:

Plaintiff's motion to dismiss appeal is granted.

Distribution:

Clerk, Concord District Court 96-SC-402
Honorable Robert L. Cullinane
Ms. Nancy Dame Jonas
David H. Ferber, Esquire
Michael C. Moyers, Esquire
Donna K. Nadeau, Supreme Court
File

January 6, 1997

",/Howard J. Zibel,"
Clerk

Appendix U - Constitutional Provisions and Rules [Pages 26a – 33a]

STATUTES AND RULES INVOLVED

CONSTITUTIONAL PROVISIONS

1. United States Constitution, Article III, Section 2, [1]. The Judicial power shall extend to all cases, in law & equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority; . . .; . . .; . . . ; between a state and citizens of another state; between citizens of different states; . . .; and . . .

2. United States Constitution, Article IV, Section 2 (1). The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

3. United States Constitution, Article VI, Section (2). This Constitution and the laws of the United States which shall be made in pursuance thereof: and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

United States Constitution, Article VI, Section (3). The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the

United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

4. United States Constitution Article XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

(a) **42 U.S.C. §1981.** Equal rights under law. All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property . . . and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

(b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of state law.

(d) **42 U.S.C. §1982.** Property rights of citizens. All citizens of the United States shall have the same right in every state and territory, as enjoyed by . . . citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

(e) **42 U.S.C. §1983.** Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(f) **42 U.S.C. §1985.** Conspiracy to interfere with civil rights; (2) obstructing justice, intimidating party, witness or juror...; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner the due course of justice in any state or territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; (3) depriving persons of rights or privileges. If two or more persons in any state or territory conspire..., for the purpose of

depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation or threaten any citizen who is lawfully entitled...; or to injure any citizen in person or property ...; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of conspiracy, where another is injured in his person or property, or deprived of having or exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against anyone or more of the conspirators.

(g) **28 U.S.C. §1257.** State courts, certiorari, (a) final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up ordained under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States.

(h) **28 U.S.C. §1331.** Federal question.

New Hampshire Rules of The Supreme Court

1. Rule 7(1)

> "requires that a notice of appeal in a civil case be filed in this court within thirty (30) days from the date on the clerk's written notice of the decision."

2. Rule 33(1)

> "A lawyer who is not a member of the bar of this state shall not be permitted to enter an appearance in any case except on motion that may be granted if a member of the bar of this state is associated with him and is present at oral argument."

3. Rule 33(2).

> Without prior written approval of the Court, no person who is not a lawyer may represent a person other than himself or be listed on the notice of appeal or other appeal document, or on the brief or sit at counsel table in the courtroom, or present oral argument. Request for such written approval shall be made in writing at the time of filing the appeal or, if it relates to briefing or oral argument, not later than 15 days before the date scheduled for filing the brief or for oral argument. The request must contain a power of attorney signed by the party, and

witnessed and acknowledged before a justice of the peace or notary public, constituting another person as his attorney to appear in the particular action. Said other person shall be of good character. This rule is intended to accommodate, and not be in derogation of the right of a party to appear personally by a citizen of good character, as set forth in RSA 311:1. - Amended January 1, 1983; September 1, 1987.

New Hampshire Superior Court

4. Rule 19

"an attorney who is not a member of the bar of this state, shall not be allowed to engage in the trial or hearing in any case, except on motion, which will not ordinarily be granted unless a member of the bar of this state is associated with him and present at the trial or hearing."

Annotations

Cited

Cited in Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed,2d 205 (1985).

5. Rule 20.

When either party shall change attorneys during the pendency of the action, the name of the new attorney shall be entered on the docket.

Whenever the attorney of a party withdraws his appearance, and no other appearance is entered, the Clerk shall notify the party by mail of such withdrawal, and, unless he appears by himself or attorney by a date fixed by the Court, the action will be dismissed, non-suited, discontinued or defaulted, as the case may be.

Annotations

1. Effect of failure to comply with rule.
In divorce proceedings, defendant who failed to obtain new counsel or file a pro se appearance after his counsel withdrew, as required by this rule, could be relieved from his failure to comply with the rule if, due to accident, mistake, or misfortune and not through neglect, justice so required. Cote v. Cote 91983) 123 N.H. 376, 46 A2d 566.

Cited

Cited in Lakeview Homeowners Ass'n v. Moulton Constr., Inc. (1997) 141 N.H. 789, 693 A.2d 87.

Appendix V - Motion for Reconsideration in the Supreme Court of New Hampshire, Order of February 20, 1998 [Pages 34a - 40a]

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In re: Estate of Jane Bell Morey

Docket #97-658

APPELLANT'S MOTION FOR RECONSIDERATION

The Petitioner, in the above referenced case, submits herein a motion under Rule 22, Rules of the New Hampshire Supreme Court, pursuant to the Court's order dated February 20, 1998 where that order stated, "Notice of Appeal is declined. See 7(1)."

Rule 22, Rules of The Supreme Court, states that a motion may be made under Rule 22, within 10 days. Notice of Order was received February 23, 1998. A movant (shall) state with particularity the points of law or fact that in the judgment of the movant, the court has overlooked or misapprehended.

Proceeding in this manner is difficult since the court did not clarify its reasons for declining this Rule 7 appeal which has been pending for nearly five months. It is difficult to offer points of rebuttal in the manner specified since there was no written expression of the reasoning of the court. A statutory

jurisdictional bar which is legislatively governed and rule oriented is without consideration of the court's inherent and superintendence power under New Hampshire RSA 490:4 or the common law of the state. The position may be further considered under the authority of the United States Constitution. Incorporated in the constitutional provisions of the state.

The order places the appeal under the application of the defective appeal provision to foreclose access to the Supreme Court's original jurisdiction as Supreme Court Rule 11 procedures are not available to cure an appeal that is otherwise defective in timeliness although acceptable reasons were presented relative to the case law. Further, the authority of the Supreme Court to issue all writs is understood to be original. There is no full or fair opportunity to present the case for adjudication. To decline notice of appeal is to operate on an exclusively discretionary level rather than to render decision applicable to the case. The Appellate process has been narrowly circumscribed although there is authority that states that appeal is a remedy that is favored in law not to be summarily denied. Here, good and sufficient cause and clear necessity to act exists under comparable case law scenarios where justice of the case concerns is a noted factor to mollify timeliness factors.

Significant questions were raised in this appeal including:

1) An appeal under the jurisdiction of the general superintendence power of the court is embodied in RSA 490:4 so that the court can address excessive abuse of judicial authority and the ethical use of discretion. RSA 490:4 provides statutory weight in counter balance to Rule

7(1). Such concerns would be of public interest to the citizens of New Hampshire.

2) Likewise, the concerns of this case are common to the citizens of New Hampshire in the proper and lawful administration of estate and probate matters and the assessment of taxes and fees under applicable state law.

3) There were serious questions there of unconscionable misuse of attorney-client relationship for fraudulent purpose and collusive manipulation which contributed to the death of the decedent, proceeded by duress and undue influence.

The standards for granting appeal in such situations is when substantial ends of justice require such relief and where a technically based declination avails little other recourse thus denying a right to a fair trial and including appropriate retributive justice. The refusal to determine whether the inferior tribunal in this case the probate court has acted illegally in its judgment and discretion as to matters of authority or observance of the law is of significance to the citizens of New Hampshire by their court of final jurisdiction as well as their beneficiaries wherever located. Further enhancing this view is a privileges and immunities analysis under the United States Constitution. Questions of law concerning the proper distribution of a decedent's estate which turn on construction of a will, trust instrument of deed are proper issues for review by the court. Here requisite good cause has been sufficiently presented. The control and jurisdiction of the Supreme Court is comprehensive and inherent. The inherent authority is

vested in the common law of the state not exclusively in the Rules or other technical procedures.

In exercise of its power and jurisdiction, the Supreme Court may examine the merits of the contention advanced, even though the remedy involved is not an appropriate one, State ex rel. Regan v. Superior Court (1959) 102 N.H. 224,153A.2d 403; the power over inferior tribunals does not depend upon and is not limited by technical accuracy of designation of legal forms of action, Dinsmore v. Manchester (1911) 76 N.H. 1871, 81 A. 533; Attorney General ex rel. Knappp v. Littlefield (1916) 78 N.H. 185, 98A.38; the extraordinary correctional power of the court for the promotion of justice and the due administration is not hampered or defeated by abstruse technicalities of remedy, Dinsmore v. Manchester (1911) N.H. 76 N.H. 187, 81A.533.

There are questions whether there is an error correctable by the superintending power or writ of false judgment, mandamus or certiorari, Boody v. Watson (1887) 64 N.H. 162.9A.794. A petition seeking to restrain or stay the action of the inferior court is within the jurisdiction of The Supreme Court. There are constitutional questions based on substantial essential legal rights analysis and right to inheritance doctrines. A simple petition for late appeal, which was granted, is found in New Hampshire case law (1967) where the petitioner merely states that the decision of the probate court deprived the plaintiffs of considerable money to which they were entitled and this position provide a sufficient reason for overriding late appeal concerns. By denying final determination there is irreparable injury and deprivation of legal rights including exposure to liability.

The Probate inventory to show contents of the estate with corresponding appraisal values is public record. Estimated expenses submitted September 8, 1994 were never finalized including legacy and succession taxes, medical expenses and attorney's fees which were $2,000 (est) never met the requirement for forms disclosure and as such an official part of the documentation of the probate process. Implicitly, the trial court agreed that the probate inventory was a public record.

There is both a breach of fiduciary duty between attorney and client and duty to intended beneficiaries. In the case of intended beneficiaries a plaintiff must show that "there exists a duty, whose breach by the respondent attorney et al. causes the injury for which the plaintiff seeks to recover" in negligence and contract, Goodwin v. James, 134 N.H. 579, 583, 595A.2d 504, 507 (1991).

Under New Hampshire law, there is the issue of whether an attorney who drafts a testator's will owes a duty of reasonable care to intended beneficiaries. The Supreme Court ruled in Simpson v. Calivas, (N.H. 1994) 650A.2d 18, that when an attorney undertakes to fulfill the testamentary instructions of the client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, according to the case, the beneficiaries' interests loom greater than those of the client. After the latter's death, a failure in the testamentary scheme works no practical effect

except to deprive the intended beneficiaries of the intended bequests."

The law as stated above seems to apply in this matter where the privity rule is not felt to be ironclad. The general rule that a non party to a contract has no remedy for breach of contract is subject to an exception for third party beneficiaries, Arlington Trust Co. v. Estate of Wood, 123 N.H. 765, 767, 465A.2d 917, 918 (1983). Third party beneficiary status is necessary to trigger this exception. This exception under the law expressed here exists where "the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract, Tamposi Martserling Associates, Inc. v. Stary Market Co., 119 N.H. 630, 633, 406A.2d 132, 143 (1979).

The Court in Simpson v. Calivas holds that "where, as here, a client has contracted with an attorney to draft a will and the client has identified to whom he wishes his estate to pass, that identified beneficary may enforce the terms of the contract as a third party beneficiary, Stowe v. Smith, 441A.2d 84; Ogle v. Fuiten, 102 III2d 359, 80 Ill. Dec. 775, 446 N.E.2d 227; Hale v. Groce, 744/P.2d 1292. The Supreme Court of New Hampshire held that "a duty runs from a drafting attorney to an intended beneficiary, and that an identified beneficiary, has third party beneficiary status. The court also rejected defendant's contention "that even if a duty runs from a testator's attorney to an intended beneficiary, collateral estoppel would apply." Further, the party to be estopped must have had a full and fair opportunity to litigate. Here, the will did not reflect actual

intent of the testatrix and was challenged. Other issues compound this basic issue.

The Petitioner concludes by requesting that based upon the foregoing and for reasons and information previously submitted, reconsideration in this matter based on such authority of the court as is inherent and maybe sustained by the common law of the state applicable case law and statutory authority, she requests the case not be declined on Rule alone.

Respectfully submitted,

/s/ Nancy D. Jonas
March 2, 1998 Petitioner
Beaufort, SC Appellant, Pro se

RULE 3 CERTIFICATION

The Memorandum of Response was mailed this 2nd day of March, 1998, to Michael C. Moyers, Esquire, at P.O. Box 1137, Concord, New Hampshire 03302, and The Honorable Richard A. Hampe, Merrimack County Court of Probate at 163 North Main Street, Concord, New Hampshire 03301.

March 2, 1998 /s/ Nancy D. Jonas
Date Nancy D. Jonas

QUESTIONS PRESENTED FOR REVIEW

I. Whether the courts of New Hampshire met minimum standards of due process and equal protection to ensure the protection of fundamental rights under the provisions of the United States Constitution Amendment XIV, Section 1.

II. Were Privileges and Immunities as contemplated by the United States Constitution, Article IV, Section 2, violated.